

Student, BNF	§	BEFORE A SPECIAL
Parent	§	EDUCATION
Petitioner	§	
	§	
	§	
v.	§	HEARING OFFICER FOR THE
	§	
ECI LIFEPAATH SYSTEMS	§	
Respondent	§	
	§	
	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, Student bnf Parent (hereinafter Student or Petitioners) brings this action against Respondent ECI LifePath Systems (hereinafter Respondent or LifePath) under the Individuals With Disabilities Education Act (hereinafter IDEA), 20 U.S.C. §1400 *et. seq.*

Petitioners allege that Respondent violated the provisions of the IDEA by failing to provide Student with audiological services necessary for her to benefit from her early childhood intervention program. Specifically, Petitioners challenge Respondent's failure to provide mapping of Student's cochlear implant, necessary audiological testing, and costs associated with related travel.

For relief, Petitioners seek reimbursement for the costs associated with mapping Student's cochlear implant, obtaining audiological testing, and for travel expenses. In addition, Petitioners seek an order requiring Respondent to provide these services in the further at no cost as a necessary part of Student's early childhood intervention program.

Bruce Goldstein and Jay Pletcher of Buffalo, New York, and Richard Brooks Hardee of Flint, Texas represent Petitioners in this proceeding. Kathy Ellett and Catherine Greaves of Austin, Texas, and Dee Roessler of McKinney, Texas represent Respondent.

PROCEDURAL HISTORY

Petitioners filed this request for hearing on August 5, 2003. On August 27, the Hearing Officer conducted a pre-hearing conference. The matter came on for hearing on October 28, 2003. The parties filed post-hearing briefs on November 24, 2003 and reply briefs on December 5, 2003. The decision of the Hearing Officer is due on or before January 9, 2004.

FINDINGS OF FACT

1. Student is a ***-year-old child with a disability of profound deafness. Student is eligible for and receives early childhood intervention services through ECI LifePath Systems.
2. LifePath is a contractor providing early intervention services to infants and toddlers with disabilities under the auspices of the Interagency Council on Early Childhood Intervention (hereinafter ECI). LifePath is responsible for delivering services in the geographic area of Texas that serves Student.
3. ECI is the state agency in Texas responsible for the establishment of a system of early intervention services to address the needs of infants and toddlers with disabilities. ECI is the “lead agency” that provides technical assistance and monitors the activities of its contractors in providing early intervention services.
4. Student was born on *** and diagnosed as profoundly deaf at the age of eight months. Because Student attempted the use of hearing aids, but received little to no benefit from them, she became eligible to obtain a cochlear implant to provide access to sound.
5. A cochlear implant (hereinafter CI) is a habilitative device that can provide access to sound for a person whose ear structures are too severely damaged to transmit sounds delivered from a traditional hearing aid.
6. A CI consists of an internal device (an electrode with multiple channels) that is surgically implanted into the inner ear where electrical impulses are delivered and interpreted by the brain as sound, and an external device with a microphone that is worn on the body and captures environmental and speech sounds much like a hearing aid. Unlike a hearing aid, which delivers sound to the ear canal, the CI delivers electrical impulses to the implanted electrodes and the pulses are interpreted as sound.
7. Following implantation, the CI must be mapped or programmed to enable the implanted person to actually sense the impulses and have access to speech and environmental sounds. Mapping is the process of setting the parameters for each individual for how signals are sent to the implanted electrodes. Without mapping, a CI recipient would receive little to no benefit from the CI.
8. Mapping must be individualized for each person and mapping parameters change over time. After the initial year of wearing a CI, mapping may be necessary only once a year to adjust parameters according to changes in thresholds.
9. Audiological testing is also done with mapping to assess responses to various frequencies.

10. Implantation of the internal electrodes is performed by a surgeon who oversees the healing of the surgical wound and the medical management of the implantation.
11. Mapping of the CI and subsequent audiological testing are procedures performed by audiologists with specific training and equipment for mapping.
12. Student received a CI at the Callier Center in Dallas, Texas on ***, at the age of ***. Student has returned to the Callier Center several times since implantation for audiological testing and mapping of her implant. Without proper mapping, Student would not benefit from her CI.
13. Student's mode of communication is oral/aural and her family's goal is for Student to develop into an oral deaf child. Her Individualized Family Service Plan (hereinafter IFSP) developed through LifePath is premised on this mode of communication and includes early intervention services of speech therapy, auditory instruction, and physical therapies that are all provided in her home. Although Student's CI allows her to hear sounds, therapy and instruction are necessary for her to learn to understand and interpret the sounds.
14. Student has experienced very positive benefits from her CI and has progressed faster than what might be expected. It is anticipated that, with continued services and progress, Student would attend kindergarten in a regular education classroom with inclusion based support services.
15. Early intervention is a critical factor in a hearing impaired child's ability to achieve successful oral communication. By three to four years of age, the probability of successfully obtaining oral communication decreases.
16. Student would not benefit from her early intervention services or achieve the communication goals of her IFSP without the mapping and audiology services that enable her CI to work properly such that she can access sound. All of Student's therapists rely on oral communication to work with Student and provide her services.
17. In spring 2003, Petitioners requested that LifePath/ECI provide mapping and related audiological and travel costs as covered early intervention services for Student. LifePath declined to provide these services on the grounds that mapping is a medical service because cochlear implants are considered durable medical equipment.
18. LifePath's decision that mapping was not a covered service was based on the decision of ECI that mapping is not within the array of services covered by ECI.

DISCUSSION

The sole issue presented is whether mapping of Student's cochlear implant, and the related costs of audiological services and travel expenses, are required services under Part C of IDEA such that Respondent must provide them at no cost to Petitioners.

Petitioners argue that that Respondent is obligated to provide mapping to Student because the mapping services fall within the definition of covered services under Part C as both audiology services and health services necessary for Student to benefit from her other early intervention services, and are necessary to address Student's developmental needs. Petitioners further argue that decisions rendered under Part B of IDEA have uniformly held that mapping is covered as a related service and that such decisions are appropriate guidance for the instant case given the similarities between Part B and Part C of IDEA.

Respondent counters that mapping is not a developmental service as contemplated by Part C, but rather, is a service incidental to a surgical procedure that is medical in nature. Because the mapping is required in order to effectuate the implantation, Respondent argues that it is truly "part and parcel" of the implantation surgery, which the parties agree is not itself covered under Part C. Respondent acknowledges that decisions interpreting Part B have found mapping to be a related service, but distinguishes those precedents on the grounds that important differences between Part B and Part C render them inapplicable.

For the reasons set forth below, the Hearing Officer concludes that mapping, and the attendant audiological and transportation costs, are covered services under Part C of IDEA such that Respondent must provide them at no cost to Petitioners.

Mapping As A Covered Service Under Part C Of IDEA

IDEA governs the provision of services to children with disabilities from birth to age twenty-one through two separate mechanisms detailed in Parts B and C of the statute. Part B applies to children ages 3 to 21, while Part C governs the provision of services to infants and toddlers from birth through 2 years of age. As a *** year old, Student currently receives services under Part C of IDEA.

Part C and its implementing regulations require participating states to provide, under public supervision, early intervention services necessary to meet the developmental needs of an eligible child and the needs of the family related to enhancing the child's development. The services are to be provided at no cost to the family¹ and are to be individualized to the unique needs of the child and the family. 34 C.F.R. §300.12; 25 T.A.C. §621.23; *Letter to Anonymous*, 23 IDELR 1126 (OSEP 1993); *Letter to Byrd*, 35 IDELR 217 (OSEP 2001). The statute and regulations detail a non-exhaustive list of the types of early intervention services that must be provided, and include, in relevant part,

¹ Although Part C allows Federal or State law to provide for a system of payments by families, that is not applicable to this case as Texas law is clear that **all** services to children with auditory disabilities who are eligible for a free appropriate public education from birth under Texas Education Code, §29.003 are to be provided at no cost to the family. 25 T.A.C. §621.182(f)(2).

speech-language pathology and audiology services, health services, and transportation and related costs. 20 U.S.C. §1432; 34 C.F.R. §§303.12-303.13.

By the plain language of the statute and regulations, the services at issue herein constitute covered services under IDEA. First, the services are necessary to meet Student's developmental needs in the area of communication as an oral deaf toddler and her family's needs related to enhancing her development in this important area of communication. It is undisputed that without the mapping and audiological services provided by Callier in connection with Student's CI, she would be unable to develop her oral communication skills or derive any benefit from her other early intervention therapies that rely on oral communication. As such, these mapping services are the most basic and necessary services for Student to receive so that she can develop the foundations for oral communication in these early critical years. Respondent's analysis that mapping is not a service "necessary to meet developmental needs" because not all deaf children require mapping to progress developmentally, i.e. children who rely on other modes of communication, fails to account for IDEA's mandate that early intervention services be provided based on the **unique** needs of an eligible child and his/her family in conformity with that child's IFSP. In Student's case, meeting her developmental needs and achieving the goals of her IFSP clearly depend upon her receiving the mapping and related audiology services at issue.

Second, the mapping services and audiological testing fall within the explicitly designated category of audiology services as set forth in the regulations. The audiological testing completed by Student's audiologist at Callier utilized audiological evaluation procedures to determine the range and nature of Student's communication functions (34 C.F.R. §303.12(d)(2)(ii)), and the mapping itself is an audiological service required by a person with a CI to adjust parameters and ensure optimum efficiency of the CI. In addition to constituting audiology services, these services are also encompassed by the definition of "health services," which are defined as "services necessary to enable the infant or toddler to benefit from the other early intervention services." 20 U.S.C. §1432; 34 C.F.R. §303.13(a). As discussed previously, there is no dispute that Student requires proper mapping and the related audiological testing to benefit from her other early intervention services. Finally, the transportation costs requested also fall within an explicitly designated category of early intervention services. 34 C.F.R. §303.12 (d)(15).

Despite Student's clear developmental need for these services and the explicit inclusion of these services in the definitions of early intervention services, Respondent argues that the services are excluded from coverage as medical services due to their inextricable link to the cochlear implant surgery itself. Respondent points out that the mapping is not a developmental service provided to a child, but rather, is a medically oriented procedure that is "part and parcel" of the CI surgery.² Given that Respondent is

² Respondent also urges the Hearing Officer to find that mapping is not a covered service based on the current Senate version of the IDEA reauthorization and committee report, which propose specifically eliminating mapping of a CI as a covered service under Part B of IDEA. The Hearing Officer finds that the proposed amendments to IDEA and discussion contained in the committee report actually support the conclusion that the law **at this time** is that mapping services are covered under IDEA and are not excluded as medical services. The Hearing Officer is obligated to interpret and apply the law, as it currently exists and not based on speculation as to how it might change in the future.

clearly not responsible for providing a child with a CI, Respondent argues that it should not logically be responsible for providing this service that is necessitated by and tied to the implant surgery.

Although the Hearing Officer agrees that mapping is a service for which the need arises only because of the implantation surgery, the Hearing Officer is not persuaded that the mapping and audiological testing performed by an audiologist after the installation of a CI constitute medical services. As a factual matter, the services themselves are not medical or surgical in nature, but are audiology services required by a child who obtains a CI, i.e. these are not one time services that are performed solely in connection with the surgery, but rather are ongoing services that must be provided throughout the lifetime of the CI to adjust changing parameters and ensure optimum efficiency. As a deaf person with a CI, mapping becomes a necessary part of the array of services Student needs to obtain **from an audiologist** in order to develop communication skills. These services are similar to physical therapy services necessitated when a child obtains a prosthetic limb or speech therapy services necessitated by cleft palate surgery, services that are clearly covered by the array of early intervention services required under Part C.

Further, as a matter of law, the Supreme Court set forth a clear definition of medical services that are excluded from coverage under IDEA in *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999): those services performed by a physician. Although the court in *Cedar Rapids* was addressing the definition of medical services under Part B of IDEA rather than Part C, the Hearing Officer finds the analysis wholly applicable to Part C; particularly in light of Part C's distinction between covered health services and non-covered medical services that closely tracks the language of Part B. 34 C.F.R. §303.13.

Respondent's argument that the *Cedar Rapids* test should not determine the meaning of medical services under Part C because the standard for providing related services under Part B is not the same as Part C mixes apples and oranges: the standards for providing services, i.e. under Part C, whether the services are necessary to meet developmental needs, or under Part B, whether the services are necessary to assist a child to benefit from his/her special education program, determine when a covered service must be provided to a child, while the definitions of those services address whether they are covered services at all. In other words, *Cedar Rapids* defines what services are exempt from coverage as medical services; it does not address the standard for when an allowed service must be provided to a particular child. Even so, courts have interpreted the standards for providing services under Parts B and C to be similar in requiring the provision of services reasonably calculated to provide developmental or educational benefit. *Wagner v. Short*, 31 IDELR 53 (D.C.MD 1999). For these reasons, the Hearing Officer concludes that the court's holding in *Cedar Rapids* applies to Part C as well as Part B.

In summary, the Hearing Officer finds that the services at issue constitute audiology services, health services necessary for Student to benefit from other early intervention service, and/or related transportation costs within the meaning of Part C of IDEA. The Hearing Officer further finds that Student needs these services to meet her developmental needs in the area of communication development and to address the

priorities and concerns of her family related to enhancing her development. As required early intervention services, Respondent is responsible for ensuring the provision of these services to Student at no cost to her family.

Relevance Of Legal Guidance Under Part B Of IDEA

Legal precedent under Part B of IDEA that has unanimously concluded that mapping of a child's CI is a covered related service further supports the conclusion that the services at issue constitute required services under Part C of IDEA. See, *Stratham School District v. Beth and David P.*, 38 IDELR 121 (D.N.H. 2003); *Avon Local School District*, 38 IDELR 245 (SEA 2003). In reaching the conclusion that mapping is a covered related service, courts have emphasized that mapping is necessary for adequate language development and for a child to benefit from other instruction. In order to provide the required individualized instruction, schools must recognize that when a child's mode of communication involves the use of his/her CI, then the CI must be mapped in order for the child to benefit from any other instruction. *Stratham, supra*.

The Hearing Officer finds that this case law interpreting Part B provides important guidance for the instant dispute. Courts have considered the relationship between Parts B and C and have concluded that, while the provisions of the two parts are "distinct in notable respects, their basic structure and purpose are strikingly similar." *Still v. DeBuono*, 25 IDELR 32 (2nd Cir. 1996). See also, *Wagner v. Short*, 31 IDELR 53 (D.C.MD 1999). In the instant case, this is particularly true given the virtually identical definitions of audiology services contained in Parts B and C (compare 34 C.F.R. §300.24(b)(1) with 34 C.F.R. §303.12(d)(2)), and the shared requirement in Parts B and C that services be provided that are necessary for the child to obtain benefit from other provided services (compare 34 C.F.R. §300.24 defining related services in relevant part as services "required to assist a child...to benefit from special education." with 34 C.F.R. §303.13(a) defining health services as "services necessary to enable a child to benefit from the other early intervention services under this part").

Respondent points to a number of distinctions between the structure for providing services under Parts B and C to argue that the cases under Part B are not relevant to whether a service is covered under Part C. Specifically, Respondent argues that because Part C contemplates a system of providing services to families in which the state coordinates the provision of services from a variety of sources, determining through the IFSP process what services are necessary and assigning responsibility for payment of those services to various agencies, the state is not required to provide the services in the manner mandated by Part C. The Hearing Officer recognizes the significant differences between the manner of providing services under Parts B and C, with Part B requiring local school districts to pay for and provide all necessary services for students and Part C requiring the early intervention service agency to identify necessary developmental services, but not necessarily to provide or pay for the services through the agency's funds. However, these distinctions do not impact whether a particular service must be provided to a child as an early intervention service necessary to meet the child's developmental needs; rather, they pertain to what public entity must actually provide and fund the service. Where, as here, services are found to meet the definition of early intervention services that are needed to meet a child's developmental needs, the services

must be provided free of cost to the family. 34 C.F.R. §303.12(3)(iv); 19 T.A.C. §621.182(f)(2). Whether Respondent pays for those services itself or designates other payment sources for the services is a separate consideration from the family's entitlement to the services at no cost; that determination must be made based on whether the services are covered under Part C and whether they are necessary to meet Student's developmental needs.

Respondent's argument that the legal guidance under Part B is not relevant to Part C fails to reconcile IDEA as a whole and to consider the common purposes of Parts B and C to address the needs of children with disabilities and their families, and to provide equal access to educational opportunities within the public schools. The result of Respondent's legal interpretation would mean that mapping as a covered service under IDEA would be provided to a child only when s/he reaches three years of age and becomes eligible for services under Part B of IDEA. This outcome would seriously diminish an infant or toddler's ability to achieve oral communication skills with a CI in the critical years, and could thus negatively impact the ability of those children to access regular education settings upon reaching school age. This directly conflicts with the finding of Congress in enacting Part C of an "urgent and substantial need to reduce the educational costs to our society, including our Nation's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age." 20 U.S.C. §1431(a)(2).

The Hearing Officer finds no meaningful distinctions between Parts B and C of IDEA that pertain to whether mapping and associated services and costs are covered services that must be provided under the law. Rather, the Hearing Officer finds that reconciling the provisions of Parts B and C as described above furthers the policies and purposes of IDEA.

CONCLUSIONS OF LAW

1. Student is a *** who is eligible for early intervention services under the provisions of IDEA and its implementing regulations as a child with profound deafness. 34 C.F.R. §303.16.
2. Respondent ECI LifePath Systems is the state program operating under the auspices of the ECI responsible for providing early intervention services to Student. 25 T.A.C. §621.23.
3. Mapping of Student's cochlear implant, related audiological testing, and associated transportation costs are early intervention services covered by Part C of IDEA. These services are necessary for Student to obtain a reasonable developmental benefit and must be provided at no cost to Student's family. 34 C.F.R. §§303.12-303.13.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby **ORDERS** that the relief sought by Petitioner is **GRANTED**.

It is hereby **ORDERED** that Respondent reimburse Petitioners for out-of pocket expenses for previous mapping of Student's cochlear implant, related audiological testing, and associated travel expenses related to these services. It is further **ORDERED** that Student's IFSP be amended to provide these services henceforth at no cost to Student's family.

All relief not expressly granted herein is hereby **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

SIGNED and **ENTERED** this 9th day of January 2004.

/s/ Lynn E. Rubinett

Lynn E. Rubinett

Impartial Hearing Officer